COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN RE:	§	No. 08-17-00053-CR
JESUS GANDARA, JR.,	§	AN ORIGINAL PROCEEDING
RELATOR.	§	IN MANDAMUS
	§	

O P I N I O N

Relator, Jesus Gandara, has filed a mandamus petition against the Honorable Gonzalo Garcia, Judge of the 210th District Court of El Paso County, Texas. He asks the Court to order Respondent to set aside orders extending community supervision and imposing a fine of $3,000.[1] The State has filed a response conceding that Relator is entitled to mandamus relief with respect to the order imposing the fine of $3,000, but it argues that the District Court had discretion to extend the period of community supervision for a period of one year. We conditionally grant mandamus relief.

FACTUAL SUMMARY

On June 11, 2015, Relator waived his right to a jury trial and entered a negotiated plea of guilty to the lesser-included offense of theft of property having a value of more than $50 but less

[1] The underlying case is styled *The State of Texas v. Jesus Gandara, Jr.* and the cause number is 20130D01343.

than $500, a class A misdemeanor.[2] The trial court followed the plea bargain, found Relator guilty of the lesser included offense, and placed him on community supervision for two years. The judgment reflects that the punishment assessed by the court did not include a fine.[3] Relator's community supervision was transferred to Sonia Islas, a Senior Community Supervision Officer for El Paso County, on August 9, 2016 because he was up to date on all fees and because he qualified as a "low risk" case based on his Texas Risk Assessment Questionnaire score.

On November 28, 2016, Relator filed a motion for early discharge from community supervision, alleging he had satisfactorily completed more than one-third of the original community supervision period and had paid all court costs, restitution, and probation fees. Relator's motion also alleged that he had been accepted to graduate school at Western New Mexico University and he was scheduled to begin classes in the Spring 2017 semester. Respondent denied the motion on December 13, 2016. On that same date, Respondent set the case for a status conference on February 2, 2017. Ms. Islas believed that the sole purpose of the hearing was to review Relator's finances because he has not violated any terms or conditions of community supervision and he is up to date on all fines and fees owed.

At the status conference hearing, Ms. Islas provided the court with the financial analysis her office had prepared with the cooperation of Relator. It showed that Relator's total income for the month of December 2016 was $3,062.12 and his expenses were $3,174.80. The financial statement also reflected that Relator had been employed as a contract employee by Sights for Service, Inc. and his net salary for the month of December 2016 was $97.28. Respondent began

[2] The mandamus record does not include the indictment, but the judgment and community supervision order reflects that Count I of the indictment charged Relator with theft of property having a value of more than $1,500 but less than $20,000. Under the plea bargain, he pled guilty to the lesser included offense.

[3] In the portion of the judgment setting out the fine, court costs, and restitution, the judgment reflects that the fine was "$0," the court costs were $258.00, and restitution was $450.00.

the hearing by expressing his belief that Relator was not working even though he had the ability to do so, and he informed Relator that he was going to extend his probation by two or three years and impose a fine of $3,000 to $4,000, or alternatively, impose a condition requiring him to reimburse the county for court-appointed counsel in the same amount. The court also stated that Relator would not be allowed to attend graduate school or leave El Paso County until he had paid the fine. Even though the financial analysis showed that Relator has been employed for a year, and Relator informed the court that he had been working continuously since he was placed on probation, the court announced at the conclusion of the hearing that it was imposing a fine of $4,000 and extending Relator's community supervision by three years. On February 2, 2017, Respondent entered a written order extending community supervision by three years beginning on June 11, 2017. On that same date, Respondent also entered an order modifying the terms and conditions of community supervision to reduce the community supervision fee from $60 to $25 per month, but the order also assessed a fine in the amount of $3,000.

Relator filed a mandamus petition and motion for emergency relief. After receiving a response from the State regarding the motion for emergency relief, the Court entered an order staying the challenged orders.

MODIFICATION OF COMMUNITY SUPERVISION

In two related issues, Relator challenges the trial court's orders modifying the terms and conditions of community supervision.

Standard of Review

To be entitled to mandamus relief, the relator must make two showings: (1) that he has no adequate remedy at law; and (2) that what he seeks to compel is a ministerial act. *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex.Crim.App. 2013); *see In re State of Texas*, 162 S.W.3d 672,

675 (Tex.App.--El Paso 2005, orig. proceeding). The ministerial act requirement is satisfied if the relator can show a clear right to the relief sought. *Weeks*, 391 S.W.3d at 122. A clear right to relief is shown when the facts and circumstances dictate but one rational decision "under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles." *Id., quoting Bowen v. Carnes*, 343 S.W.3d 805, 810 (Tex.Crim.App. 2011).

No Adequate Remedy at Law

Relator does not have any available remedy other than mandamus to challenge the trial court's orders extending community supervision and imposing a fine. The order imposing the fine expressly modified the terms and conditions of community supervision. A trial court's order extending community supervision is also a modification of the conditions of community supervision under the Texas Code of Criminal Procedure. *Christopher v. State*, 7 S.W.3d 224, 225 n.1 (Tex.App.--Houston [1st Dist.] 1999, pet. ref'd). An order which modifies the terms and conditions of probation is not an appealable order. *See Davis v. State*, 195 S.W.3d 708, 711 (Tex.Crim.App. 2006); *Eaden v. State*, 901 S.W.2d 535, 536-37 (Tex.App.--El Paso 1995, no pet.). Thus, neither of the challenged orders is appealable.

The orders are also not subject to attack by petition for writ of habeas corpus. Under Article 11.072, an applicant may challenge a condition of community supervision only on constitutional grounds. *See* TEX.CODE CRIM.PROC.ANN. art. 11.072, § 3(c)(West 2015). Thus, a petition for writ of mandamus is the only avenue of relief available to Relator.

Imposition of the Fine

In his first issue, Relator argues that the District Court had no discretion or authority to modify community supervision and impose the $3,000 fine. The State agrees that because there

was no violation by Relator of a condition of community supervision, the District Court did not have authority to assess a fine.

Article 42A.752 of the Texas Code of Criminal Procedure, which is titled, "Continuation or Modification of Community Supervision After Violation," provides that a judge may, after finding that the defendant violated a condition of community supervision, impose any other conditions the judge determines are appropriate, including "an increase in the defendant's fine, in the manner described by Subsection (b)." TEX.CODE CRIM.PROC.ANN. art. 42A.752(a)(3)(West Supp. 2016).[4] Under Subsection (b), a judge may impose a sanction on a defendant by increasing the fine imposed on the defendant, but the original fine and the increase may not exceed the maximum fine for which the defendant was sentenced. TEX.CODE CRIM.PROC.ANN. art. 42A.752(b).

As noted by both Relator and the State, the trial court did not find that Relator had violated a condition of community supervision. Consequently, the court did not have authority under Article 42A.752 to impose a fine as a sanction. Issue One is sustained.

Extension of Community Supervision for Three Years

In his second issue, Relator contends that the District Court did not have authority to extend community supervision. The State responds that a court has discretion to extend a probationer's period of community supervision even without a revocation motion, but it concedes that the District Court could not extend Relator's misdemeanor community supervision for more than one year.

A trial court has discretion to determine the appropriate period of community supervision

[4] Effective January 1, 2017, Article 42A of the Code of Criminal Procedure replaced Article 42.12. Acts 2015, 84th Leg., R.S., ch. 770, § 1.01, 2015 TEX.GEN.LAWS 2321. Respondent entered the challenged orders on February 2, 2017, after the effective date of the revision. Consequently, the revised statute applies here.

provided it falls within the permissible statutory period. *See Mayes v. State*, 353 S.W.3d 790, 795-96 (Tex.Crim.App. 2011). Relator contends that a trial court may extend community supervision only if it first finds that a violation of the conditions has occurred. This argument is inconsistent with the applicable statute. Under Article 42A.753(a), a trial court may, on a showing of good cause, "extend a period of community supervision under Article 42A.752(a)(2) as frequently as the judge determines is necessary . . ." but the statute provides limitations on the length of the extension. *See* TEX.CODE CRIM.PROC.ANN. art. 42A.753(a). If a trial court's discretion to extend community supervision is limited to those situations where a motion to revoke is filed and a violation is found by the court, the statutory language is rendered meaningless because good cause will exist in every case where the court finds that the probationer has violated a condition of community supervision. In construing a statute, a court must presume that every word, phrase, clause, or sentence was purposely chosen and when a court seeks to interpret or construe a statute, it should attempt to give effect to all if possible. *See* TEX.GOV'T CODE ANN. § 311.021(2)(West 2013); *State v. Hardy*, 963 S.W.2d 516, 520 (Tex.Crim.App. 1997).

As observed by the State, courts have held that a trial court has discretion to extend the period of community supervision with or without a revocation motion and with or without a hearing. *See Calderon v. State*, 75 S.W.3d 555, 558 (Tex.App.--San Antonio 2002, pet. ref'd)(op. on reh'g)(interpreting former art. 42.12, § 22(c) as authorizing a judge to extend a period of community supervision "as often as the judge determines is necessary," and such action may be taken with or without a motion for revocation or a hearing), *citing Warmoth v. State*, 946 S.W.2d 526, 527 (Tex.App.--Fort Worth 1997, no pet.); *Prevato v. State*, 77 S.W.3d 317, 319-21 (Tex.App.--Houston [14th Dist.] 2002, no pet.)(rejecting appellant's argument that trial court did not have authority to extend community supervision because it did not hold a hearing or find that

appellant had violated the original terms of his community supervision); *see also Ex parte Harrington*, 883 S.W.2d 396, 400 (Tex.App.--Fort Worth 1994, pet. ref'd). Article 42A.753(a) does not limit a judge to extending community supervision only when a motion to revoke is filed and the court finds that the probation violated a condition of the original terms of community supervision. It expressly authorizes a judge to extend community supervision "as frequently as the judge determines is necessary" provided that a showing of good cause is made. *See* TEX.CODE CRIM.PROC.ANN. art. 42A.753(a).

The question is whether good cause existed for the court to extend Relator's community supervision. The applicable statues do not define "good cause," but both Relator and the State point to a decision of the Amarillo Court of Appeals which provides a definition of "good cause" in this context. *Barton-Rye v. State*, No. 07-16-00096-CR, 2016 WL 4678963, at *1 (Tex.App.--Amarillo September 1, 2016, pet. ref'd)(mem. op., not designated for publication). The Seventh Court of Appeals considered definitions of "good cause" found in Black's Law Dictionary and Webster's Dictionary, and it found that the phrase "connotes something akin to a legitimate or substantial reason, as opposed to mere arbitrariness." *Id.* The Amarillo Court's decision is well-reasoned and we will apply its definition of good cause in this case.

Relator asserts that good cause does not exist in this case because he did not violate any conditions of community supervision and he paid all costs and fees. The State, on the other hand, argues that good cause for the extension exists because the conditions of community supervision required Relator to "[w]ork faithfully at suitable employment as far as possible," but the evidence showed that Relator was earning only $97.28 per month.

Relator's employment status was the trial court's primary focus at the status conference hearing. Respondent repeatedly stated his unfounded belief that Relator was unemployed, but the

financial statement provided to the court reflects that Relator has been employed for one year by Sights on Service, Inc. as a contract employee. Further, Relator informed the court during the hearing that he had worked continuously since he was placed on community supervision. The State is correct that Relator's salary for December 2016 was only $97.28, but there is no evidence regarding Relator's employment income for the rest of 2016. Given that Relator is a contract employee, the evidence does not permit an inference that Relator's income is always $97.28 per month. The evidence before the trial court is insufficient to support a conclusion that Relator had not worked faithfully at suitable employment as far as possible. Consequently, the trial court's implied finding of "good cause" is not supported by the evidence. Issue Two is sustained.

Having sustained both issues, we conditionally grant mandamus relief. Respondent is directed to set aside the February 2, 2017 order extending community supervision by three years beginning on June 11, 2017, and the February 2, 2017 order modifying the terms and conditions of community supervision by assessing a fine in the amount of $3,000. The writ of mandamus will issue only if the trial court fails to act in accordance with this opinion.

June 30, 2017

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Palafox, JJ.

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